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No. 386

In the

Supreme Court of the United States

October Term, 1955

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, AFL, Local Union No. 294,
Petitioner,

v

WESTERN FOUNDRY COMPANY
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WESTERN FOUNDRY COMPANY
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The International Molders & Foundry Workers Union of North America, AFL, Local Union No. 294, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 17, 1955.

OPINIONS BELOW

The District Court did not render an opinion. Its findings of fact, conclusions of law and judgment are found

at R. 28-45, 70. The opinion of the Court of Appeals (R. 298) entered on March 30, 1955, is reported at 220 F. 2d 939. The *per curiam* opinion (R. 315) issued by the Court of Appeals on May 20, 1955, when it withdrew its prior opinion, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1955 (R. 316). A petition for rehearing duly filed by the petitioner (R. 334) was denied on June 17, 1955 (R. 329, 334). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Court of Appeals held that the union was entitled to recover damages from the employer for breach of a collective bargaining contract entered into pursuant to provisions of the National Labor Relations Act, as amended, the National Defense Production Act of 1950, as amended, and Rules, Regulations and Orders issued thereunder, in that the employer by refusing to join in a petition to obtain approval from the Wage Stabilization Board for a wage increase and by affirmatively obstructing the union's attempts to obtain such approval, violated its implied promise to take the necessary steps under the federal statutes and regulations to enable it to fulfill its obligations under the contract. Upon learning of this Court's decision in *Employees v. Westinghouse Corp., 348 U. S. 437*, the Court of Appeals withdrew its decision and ordered the suit dis-

missed for lack of jurisdiction. The questions presented are:

1. Whether Section 301 of the Labor Management Relations Act confers on the federal district courts jurisdiction of this suit

2. Whether this suit is within the jurisdiction of the federal district courts as a case arising under the laws of the United States.

3. Whether the failure of the union in its complaint to cite 28 U. S. C. 1331, and its reliance solely on the Labor Management Relations Act, required the dismissal of this suit for lack of jurisdiction where the Court of Appeals determined that on the merits of the federal question raised the union should recover.

4. Whether in the circumstances of this case it was an abuse of discretion for the Court of Appeals to deny the union leave applied for under 28 U. S. C. 1653 to file an amended complaint to correct its allegations of jurisdiction.

STATUTES INVOLVED

The pertinent provisions of the Labor Management Relations Act (29 U. S. C. 141, et seq.) are set out in Appendix A, infra, pp. 24 ff. The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. 151, et seq.), are set out in Appendix B, infra, pp. 25 ff. The pertinent provisions of the Defense Production Act of 1950, as amended (50 U. S. C. A. App. 2101, et seq.), are set out in Appendix C, infra, pp. 27 ff. The perti-

nent provisions of the Rules and Regulations of the Wage Stabilization Board are set out in Appendix D, infra, pp. 29 ff.

STATEMENT

The National Labor Relations Board, on June 17, 1948, certified the International Molders & Foundry Workers Union of North America, AFL, Local Union No. 294, hereinafter called the Union, as the exclusive collective bargaining representative of all the production and maintenance employees of the Western Foundry Company, hereinafter called the Employer, at its Tyler, Texas, foundry (R. 29). On November 17, 1951, the Union and the Employer executed a written collective bargaining agreement to be effective from November 9, 1951, to November 18, 1952 (R. 30). This agreement contained, interlined in ink in the handwriting of the Employer's attorney, Hathaway, words having the effect of obligating the Employer to grant to the employees covered by the agreement, wage increases equal in amount and time of payment to any wage increase occurring in the soil pipe industry generally during the term of the agreement (R. 33-34). The agreement provided that all wage increases granted were subject to approval by the Wage Stabilization Board (R. 37).

On January 2, 1952, there was a general 5 cent per hour wage increase in the soil pipe industry (R. 35). The Employer refused to grant this increase to the employees covered by the agreement, informing the Union that its attor-

ney, Hathaway, and its foundry superintendent, Pope, had no authority to bind it to such an agreement (R. 36).

The Employer did agree to give the 5 cent increase to certain piece rate workers and four classifications of its hourly paid mechanics and to this end joined with the Union in petitioning the Wage Stabilization Board for approval for the 5 cent increase to this limited group of employees (R. 39). The Union filed with the Wage Stabilization Board an amendment to the petition in which amendment the Union requested approval of the 5 cent increase for all employees covered by the agreement of November 17, 1951 (R. 39-40). The Employer not only refused the Union's request that it join in seeking approval of the 5-cent increase by the Wage Stabilization Board for the employees generally (R. 40), but wrote the Wage Stabilization Board opposing the Union's request for approval and denying its agreement to grant any such increase (R. 83, 88, Plaintiff's exhibit 3 and R. 303). The Wage Stabilization Board accordingly refused to accept the Union's ex parte application for approval (R. 40).

The Employer at no time put into effect the 5-cent increase granted by the industry on January 2, 1952. When the agreement of November 17, 1951 expired in November, 1952, the failure of the Employer to grant this increase made it impossible for the parties to reach any agreement for a renewal of the previous terms or new terms (R. 159-162). As a result the Union went on strike

on February 9, 1953 (R. 159-160). The strike was unsuccessful and the employees returned to work without any contract on April 1, 1953 (R. 161-162).

The Union on March 30, 1953, filed the instant suit in the federal district court against the Employer alleging that the latter breached its contract by its failure to grant the 5-cent per hour increase and praying damages for such breach (R. 1-4). The complaint recited that the action "arises and is brought under the Labor Management Relations Act of 1947, 61 Stat. 136, U. S. C. Title 29, Supp. IV, Section 151 et seq. as hereinafter more fully appears" (R. 2).

After a full trial the district court found that the Employer was bound by the provision of the agreement of November 17, 1951 that it would match wage increases in the industry. The district court found that the Employer had authorized its attorney, Hathaway, and its foundry superintendent, Pope, to enter into such an agreement and also had ratified the agreement after it was made (R. 30-37, 42-43). The district court, however, denied recovery because it believed that approval by the Wage Stabilization Board was a condition precedent to the obligation which the Union alleged had been breached (R. 44-45). Accordingly the district court entered judgment on the merits for the Employer (R. 70).

On appeal by the Union, the Court of Appeals for the Fifth Circuit, on March 30, 1955, handed down its opinion reversing and remanding with directions to enter judg-

ment for the Union (R. 298-304). The Court of Appeals held that the failure to secure the approval of the Wage Stabilization Board prevented any payment of the wages but the Union could recover damages for breach of the collective bargaining agreement (R. 304).

The Court of Appeals, construing the contract together with the provisions of the National Defense Production Act of 1950, as amended, and the Rules and Regulations of the Wage Stabilization Board issued thereunder, held that the Employer was under an implied obligation to join with the Union in seeking approval from the Wage Stabilization Board for the 5 cent per hour wage increase (R. 301-302). The Court of Appeals further held that if the Employer had joined with the Union in seeking such approval, it would have been granted (R. 301). The Court of Appeals found that the Employer not only failed to join in seeking approval but affirmatively obstructed the efforts of the Union to obtain approval (R. 302-304). In all of these regards, the Court of Appeals held that the Employer had breached its contractual obligations and was liable to the Union for the damages it had suffered (R. 304).

The Employer filed a petition for rehearing in which it urged that this Court's decision in *Employees v. Westinghouse Corp., 348 U. S. 437*, required a dismissal of the suit for lack of jurisdiction. The Court of Appeals granted

the rehearing, and without receiving new briefs or argument thereon, on May 20, 1955, enter a *per curiam* opinion withdrawing its previous opinion and remanding to the district court with instructions to dismiss the complaint for lack of jurisdicton (R. 315, 316).

The Union promptly thereafter filed in the Court of Appeals a motion for leave to file supplemental complaint, together with a tendered supplemental complaint, and motion for rehearing in which it sought leave under 28 U. S. C. 1653 to amend its allegations of jurisdiction to assert that the case arose under the Defense Production Act of 1950, as amended, and Rules and Regulations issued thereunder, as well as under the Labor Management Relations Act, and hence was within the jurisdiction of the federal district courts under 28 U. S. C. 1331. The court on June 17, 1955 denied all the Union's motions (R. 329, and Order following R. 333).

REASONS FOR GRANTING THE WRIT

1. This case presents for decision by this Court important issues respecting the meaning and effect of Section 301 of the Labor Management Relations Act which were left in a most confused state by reason of the inability of the members of this Court to agree upon an opinion in *Employees v. Westinghouse Corp., 348 U. S. 437.* The general effect of this Court's decision in that case has been to create in the minds of courts and litigants alike great uncertainty

as to whether any suits for the enforcement of collective bargaining agreements may be brought in the federal courts. In the three cases to reach the courts of appeals since the decision in *Westinghouse* the courts have assumed that they were compelled to dismiss the case for want of jurisdiction.[1] Two district courts took a similar view,[2] but two others assumed jurisdiction,[3] one of them commenting that the *Westinghouse* "case does not clarify the scope of power of federal courts in suits under Section 301 of the Taft-Hartley Act, since there was a 3-2-1-2 split in that regard."[4]

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[1] *International Longshoremen's Union v. Libby McNeil & Libby, 9 Cir., April 4, 1955, 221 F. 2d 225,* affirming dismissal of complaint seeking declaratory judgment that employer owed an employee wages for a period during which he was allegedly wrongfully discharged; *Mengel Co. v. Nashville Paper Products and Specialty Workers Union, 6 Cir., April 16, 1955, 27 C. C. A. Lab. Cas. Par. 69, 118, pp. 88, 733,* affirming dismissal of a suit by an employer to set aside an arbitration award which restored a discharged employee to his former job, one judge dissenting and distinguishing the *Westinghouse* case; *Ferguson-Steere Co. v. Teamsters Union, 5 Cir., June 24, 1955, 36 L. R. R. M. 2276,* reversing and directing that the suit be dismissed for want of jurisdiction where the employer sought a declaratory judgement that the failure of either party to give a 60-day notice of termination as required by the collective bargaining agreement resulted in the automatic renewal of the agreement.

[2] *United Shoe Workers v. Milson Shoe Corp., D. Mass., June 23, 1955, 36 L. R. R. M. 2302,* dismissing suit by union alleging breach of a collective bargaining contract in that the employer did not perform its obligations to give vacation and holiday pay; *Newspaper Guild of Pawtucket v. Times Publishing Co., D. R. I., May 18, 1955, 131 F. Supp. 499, 501,* dismissing suit by union to compel submission of issue of wage increases to arbitration.

[3] *Textile Workers Union v. Lincoln Mills of Alabama, N. D. Ala., April 29, 1955, 36 L. R. R. M. 2361,* sustaining jurisdiction of suit by union to compel arbitration of individual grievances which had been processed through the three-steps preceding arbitration; *United Textile Workers of America v. Goodall-Sanford, Inc., D. Me., S. D., June 1, 1955, 36 L. R. R. M. 2272,* granting motion for summary judgment to enforce arbitration of issue of employer's right to terminate the employee status of certain employees who were on lay off status but nevertheless retained their rights to life, health, accident and hospitalization insurance so long as they retained their employee status.

[4] *United Textile Workers of America v. Goodall-Sanford, Inc.,* supra, *36 L. R. M. M. at 2276.*

Nothing in the actual holding in *Employees v. Westinghouse Corp., 348 U. S. 437*, required that the instant suit be dismissed for lack of jurisdiction. The only issue upon which a majority of the members of this Court agreed in that case, namely, that a union could not sue under Section 301 to recover the personal wages of individual employees, who had available to them adequate remedies in the state courts to recover their own wages *(348 U. S. at pp. 460, 461, 464)*, has been expressly excluded from this case. The circumstances here present are such as to preclude the recovery of wages by individual employees. Indeed, the Court of Appeals expressly held that no wages could be recovered in the instant case because the absence of approval by the Wage Stabilization Board made the payment of the wages illegal under the Defense Production Act of 1950, as amended (R. 304).

In contrast to the *Westinghouse* case, the instant case involves a contractual obligation running only to the Union, not to the employees. There is no body of state precedent from which it could fairly be said that unions in such situations have available adequate remedies in the state courts.

Unless the federal courts are open to suits to enforce collective bargaining agreements as bilateral contracts between union and employer, both employers and unions are in the anomalous situation of being compelled by law to enter into bilateral contracts with each other about wages which are unenforceable between the parties to the contract. For,

except in suits brought in the courts of appeals to review or set aside orders of the National Labor Relations Board, or in states which by statute provide that collective bargaining agreements shall be enforced as contracts between employer and union (California Labor Code, Sec. 1126; S. Dak. Code, 1952 Supp., Sec. 17.1103), it is difficult if not impossible to find a court which is willing to treat the wage, hour, and working condition provisions of collective bargaining agreements as mutual contractual obligations between union and employer.

This anomalous situation had its origin in the unexplained substitution of the word "contract" for "agreement" by this and other courts in construing the collective bargaining provisions of the original National Labor Relations Act. *Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 236, 245; N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 342; Heinz Co. v. N. L. R. B., 311 U. S. 514, 523-524, enforcing 10 N. L. R. B. 963, 989; Globe Cotton Mills v. N. L. R. B., 5 Cir., 1939, 103 F. 2d 91, 94, enforcing 6 N. L. R. B. 461, 469.* An examination of the briefs in the *Heinz* case shows that the issue of treating a collective bargaining agreement as a contract was never briefed but solely the issue of reducing the agreement to writing. Unions, as the initiating party to collective bargaining negotiations, have usually not sought the execution of legal contracts, preferring that collective bargain-

ing agreements be treated as non-justiciable arrangements, and on this basis opposed the enactment of Section 301.[5]

The proponents of Section 301 repeatedly referred to this Court's decisions in the *Sands* and *Heinz* cases as the reason for enacting a law which would make collective bargaining agreements mutually binding and enforceable in the courts.[6] They complained that the law required them to make contracts with unions but that unions were not liable for damages for breach of their promises. *Hearings, Senate, op. cit., pp. 965-966, 1551.* Illustrative of the employers' position is the testimony of Alvan E. Roth, President, National Federation of American Shipping, Inc., who stated *(House, Hearings, op. cit., pp. 547, 558-559):*

> "The shipping industry favors the enactment of legislation that will subject unions to the same contractual responsibility as employers.
>
> * * * * *
>
> "Mr. McConnell. I understand you to say earlier that certain leaders are preaching to their workers that

[5]William Green (Hearings before the Senate Committee on Education and Labor, on S. 55, 80th Cong., 1st Sess., p. 1043); John L. Lewis, *id.*, pp. 2011-2012; Walter Reuther, *id.*, pp. 1321-1322; Louis Waldman, *id.*, pp. 412-413; Joseph Curran, *id.*, *pp.* 1422-1423; George Baldanzi, *id.*, pp. 1534-1535; International Longshoremen's and Warehousemen's Union, *id.*, pp. 1227-1228; Hoyt S. Haddock, *id.*, pp. 1391-1392; G. L. Patterson, *id.*, pp. 1547-1548. The historical basis of this position is stated in Edwin E. Witte, Government in Labor Disputes (1932), p. 16.

[6]Raymond S. Smethurst, Counsel for the National Association of Manufacturers, stated during the hearings *(Hearings, Senate, op. cit., p. 1798):* "The terms agreed upon during bargaining negotiations must be reduced to a written contract if requested by the union *(H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514).* Therefore, since the law requires contracts they should be legally enforceable." To the same effect see Ira Mosher, Chairman, Executive Committee, National Association of Manufacturers, *id.*, p. 965; 'If one major purpose of the labor policy of the Federal Government is to encourage the making of collective-bargaining agreements, it would be desirable that such agreements be considered as legally enforceable contracts'." Tyre Taylor, General Counsel Southern States Industrial Council, Hearings before House Committee on Education and Labor, 80th Cong., 1st Sess., p. 2345. Cf. 92 Cong. Rec. A 3303-3307.

contracts are unilateral as to their enforcement. They are not enforceable against one party, against labor?

"Mr. Roth. That is right.

"I sat down with one of the leading labor attorneys in San Francisco some years ago. I said 'The first thing I would like to know is whether each party agrees that once this contract is entered into it will be enforceable both ways.'

"The reply was that I ought to know better than to assume that any labor contract was a bilateral contract.

"I closed up my brief case and told him I would resume negotiations when it became worth while."

The proponents of Section 301 were not exaggerating when they complained of the unenforceability of collective bargaining agreements under state law. There appears to have been no reported case prior to 1947 in which an employer ever recovered damages from an unincorporated union for breach of a collective bargaining agreement. The one case often cited for the proposition that recovery of such damages may be had from a union involved a libel in admiralty against the funds of two incorporated unions.[7] Recovery of damages by a union seems to have been limited to New York cases involving union security agreements.[8]

[7] *Nederlandsch Amer. S. M. v. Stevedores & L. B. Soc., E. D. La. 1920, 265 Fed. 397*, the only case cited as allowing an employer damages against a union for breach of contract in Anno.: Collective Labor Agreements, 95 A. L. R. 10, 43-44 (1935); Harold G. Metz, Labor Policy of the Federal Government (1945), p. 79, n. 103; Calvert P. Magruder, a Half Century of Collective Bargaining, 50 Harv. L. Rev. 1071, 1113, n. 137.

[8] The subheading on Damages in Anno.: Collective labor agreements, 95 A. L. R. 10, 43-44 (1935) contains no such case. Writing in 1931 William G. Rice, Jr., Collective Labor Agreements, 44 Harv. Law, Rev. 572, 604, states: "there is no reported decision giving damages for breach of such an agreement, except as it forms a term of an individual contract of employment for the breach of which or for tortious interference with which, suit is brought." The only reported case so holding between 1931 and 1947 appears to be *Farulla v. Freundlich, Inc., 155 Misc. 262, 279, N. Y. S. 228, 256 (1935).*

With the exception of New York and perhaps one or two other states injunctive relief seems to have been limited to union security contracts which ironically are left by the Taft-Hartley Act to state control and have been completely banned in 18 states. Those authors, writing during the period of 1935 to 1947 who commented that most courts were giving contractual force to collective bargaining agreements, had reference solely to enforcement between individual employees and the employer, as is clear both from the text and from the cases cited.[9]

The grounds upon which courts rested their refusals to consider collective bargaining agreements bilateral contracts between employer and union varied. In Great Britain and Canada collective bargaining agreements do not create justiceable rights because both parties are deemed to intend that enforcement be secured solely by economic means rather than court action.[10] Some American courts have relied upon and quoted the English authorities in refusing enforcements.[11] Other American courts have held that an unincorporated union could not be treated as a juristic person capable of entering into a legal contract,

[9]Williston on Contracts (Rev. Ed. 1936), Vol. 2, pp. 1099-1101, Sec. 379A and 1954 Cum. Supp., Vol. II, p. 33, Sec. 379A; Teller on Labor Disputes (1940), Secs. 154-177, including 1947 Cum. Suppl., Secs. 154-177.

[10]*Young v. Canadian Northern Ry. [1931], A. C. 83, 89 (P. C.):* "it constitutes no contract * * *. If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by Division No. 4 against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied."

[11]*E.g., Kessell v. Great Northern Ry. Co., W. D. Wash., N. D. 1931, 51 F. 2d 304, 305,* quoting the foregoing language from *Young v. Canadian Northern Ry.*, supra.

and that its attempts to contract gave rise at most to contracts of its members.[12] Other refusals to enforce collective bargaining agreements as bilateral contracts rested on the inability to find that the union gave any consideration,[13] the lack of mutuality of remedy,[14] or even illegality due to the duress involved in the strike or threat of strike by which the agreement was secured.[15]

The Senate Report on the bill which became the Labor Management Relations Act cited the *Heinz* decision as justification for Section 301. It stated:[16]

> "*The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties.* In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in Title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees

[12] *E.g., Barnes & Co. v. Berry, 6 Cir., 1909, 169 Fed. 225, 228:* "said associations lacked juristic personality. So far as there was any real contract at all, it must have been between the individual members of the different local associations;" *Rentschler v. Missouri Pac. R. Co., 126 Neb. 493, 253 N. W. 694, 697 (1934); Wilson v. Airline Coal Co., 295 Ia. 855, 246 N. W. 753, 755 (1933); Ryan v. Ryan, 156 Kan. 348, 133 P. 2d 119, 124 (1943).*

[13] *E.g., Wilson v. Airline Coal Co., 215 Ia. 855, 246 N. W. 753, 756 (1933); Rentschler v. Missouri Pac. R. Co., 126 Neb. 493, 253 N. W. 694, 698 (1934); Shelley v. Portland Tug & Barge Co., 158 Ore. 377, 76 P. 2d 477 (1938); Davis v. Davis, 197 Ind. 386, 151 N. E. 134 (1926).*

[14] *E.g., Beatty v. Chicago B. & Q. R. Co., 49 Wyo. 22, 52 P. 2d 404, 408 (1935).*

[15] *E.g., Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N. W. 2d 57 (1943); Dairy Coop Ass'n v. Brandes Creamery, 147 Ore. 488, 30 P. 2d 338 (1934).*

[16] Senate Report No. 105, on S. 1126, 80th Cong., 1st Sess., pp. 15-17.

to the end that an employment contract, binding on both parties, should be made.' *(H. J. Heinz & Co., 311 U. S. 514.)*

* * * * *

"If unions can breach agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. * * *

* * * * *

"*Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step.*" (Emphasis supplied.)

The legislative history of Section 301 shows that its formulation in terms of procedure rather than substantive law was accompanied by the insertion in Section 8 of the National Labor Relations Act of provisions defining collective bargaining and including therein as one element the performance of the mutual obligation of the employer and the union to execute a bilateral contract embodying any agreement reached concerning wages, hours, and terms of employment. The earlier formulation of the section providing for suits by and against unions which included provisions making it actionable to violate a collective bargaining agreement[17] became unnecessary when by other sections

[17]Section 10 of H. R. 4908, 79th Cong., 2d Sess., as it passed the House, had provided: "All collective bargaining contracts shall be mutually and equally binding and enforceable against each of the parties thereto." This formulation accomplished nothing because any collective bargaining arrangement which amounted to a contract was already binding and enforceable as the Senate Committee properly reported when it omitted the section. S. Rep. No. 1177, 79th Cong., 2d Sess., p. 8. The version restored by Senators Ball, Taft and Smith as a result of their minority report (*id.*, Part 2, at pp. 3-4, 10-14) and amendment offered and adopted in the Senate (92 Cong. Rec. 5705, 5723) used the language "suits for violation of a contract concluded as a result of collective bargaining." The draftsmen of Section 302 (a) of H. R. 3020, as reported 80th Cong., 1st Sess., avoided the possibility that use of the term "contract" would leave most collective bargaining agreements unenforceable by providing that "Any action for or proceeding involving a violation of an agreement between employer and a labor organization or other representative of employees, may be brought by either party in any district court."

of the statute the employer and the union became obligated to make their collective bargaining agreements into bilateral contracts. It was then sufficient to provide that suits for violation of contracts between an employer and a labor organization might be brought in the district courts, with the labor organization being treated as an entity.

Neither the National Labor Relations Board nor the courts have construed the requirement of Section 8(d) that the parties execute a contract as requiring the parties to place their agreement respecting wages, hours or working conditions in a form which makes it a contract under applicable state law. The historical form of collective bargaining agreement, barren of any promises by the union, and reciting merely the wages, hours and conditions to be observed by the employer, is usually accepted as compliance with Section 8(d). But even if the Board and the Courts construed Section 8(d) as requiring mutual promises, there would be no way for the parties to overcome many of the objections interposed by state courts to enforcement of collective bargaining agreements. Moreover, any attempt so to construe Section 8(d) would have the unfortunate effect of introducing the wide variety of peculiarities arising in 48 different jurisdictions into a subject where uniformity is highly desirable. Collective bargaining in multi-state units would become a problem in legal semantics.

For this reason Section 8(d) of the National Labor Relations Act, as amended, must be construed as requiring

that the usual collective bargaining agreement fixing wages, hours and terms of employment be treated as a bilateral contract between the employer and the union. So construed this provision has the effect of creating federal substantive law applicable to all suits under Section 301.[18] The contractual rights asserted in such suits rest upon federal rather than state law. Further analysis shows that other provisions of the Act supply the defects which state courts had deemed sufficient to bar a bilateral contract. The absence of consideration or lack of mutuality of obligation could no longer arise because Section 8(d) imposed on the union, as well as the employer, as an incident of reaching a collective agreement, the obligation not to change terms and conditions for a period of time. The defect of

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[18]The legislative history indicates such was the intent of the sponsors of Section 301. See Senate Report No. 1177, 79th Cong., 2d Sess., Pt. 2 Minority Views of Senators Ball, Taft and Smith, p. 13:

> "There are no Federal laws giving either an employer or even the Government itself any right of action against a union for breach of contract. Thus there is no 'substantive right' to enforce, in order to make the union sueable as such in Federal courts.
>
> * * * * *
>
> "It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will be no mutual responsibility necessary to vitalize collective-bargaining agreements. The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.
>
> "Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step."

Senator Taft similarly stated (Hearings, Senate, *op. cit.*, p. 57):

> "Mr. Secretary, of course, the basis for the jurisdiction is the Federal law—in other words, we are saying that all matters of collective-bargaining contracts shall be made in certain ways; that both parties shall be compelled to negotiate them, and they furnish the solution for the difficulty, which is an interstate difficulty. I don't see why suits regarding such collective-bargaining contracts, when made, are not properly the subject of Federal law arising under the laws of the United States, therefore subject properly to the jurisdiction of the Federal courts. I don't understand how we can cover the whole subject, as we do, in Federal laws, and then say, when you come down to suing about it, that the Federal court has no jurisdiction."

parties due to the unincorporated status of most unions was remedied by treating unions as entities, not only for purposes of suing and being sued, but for all purposes of collective bargaining. The defect of duress was eliminated by making strikes or threats of strikes protected activities, absent the violation of any specific prohibition of the federal law.

2. If the Labor Management Relations Act does not create any federal substantive law by making a contract out of something that state law usually does not regard as a contract, still the instant case is cognizable in the federal courts as a suit arising under the laws of the United States. The Union's right to recover in the instant case is based upon the construction which the Union places upon the Defense Production Act of 1950, as amended, and the Rules, Regulations and Orders issued thereunder. In its decision on the merits the Court of Appeals held that the Employer had, as part of the collective bargaining contract entered into with the Union, impliedly promised the Union that the Employer would cooperate with the Union in securing approval from the Wage Stabilization Board for the promised wage increases and that the Employer had breached this obligation to the damage of the Union (R. 301-302). The court's determination that such an implied promise inhered in the contract that the Employer had breached it, depended upon the construction which the court below placed upon the Defense Production Act of 1950, as amended, and upon the Rules and Regulations of the Wage Stabilization Board issued thereunder (R. 303-304).

Judged by the most restrictive construction of Section 301 which is suggested by Mr. Justice Frankfurter's opinion in the *Westinghouse* case, the necessity of construing and applying federal law to determine whether or not a collective bargaining agreement has been breached must suffice to establish jurisdiction. Otherwise, even viewed as a purely procedural provision, it is difficult to conceive of any situation in which the section could function, except in a rare diversity case and Congress expressly provides that diversity should not be a requisite.[19] For by its own terms Section 301 is applicable solely to suits for violations of contracts and a federal question can arise in such a suit only if the necessity of construing federal law to determine the existence or scope of the contract is deemed to present a sufficient federal question. Questions involving issues respecting the status of the union as the exclusive bargaining representative of the employees, appropriate unit, compliance with the 60-day notice provisions of Section 8(d) and most if not all of the other issues arising out of the National Labor Relations Act are within the exclusive original jurisdiction of the National Labor Relations Board and non-justiciable in the federal district courts except in suits brought by the Board to secure injunctions.[20]

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[19]The Congressional exclusion of the necessity for diversity for suits under Section 301 reflected the current law that for purposes of federal jurisdiction an unincorporated association is not a citizen of any particular state but the citizenship of its members is controlling. *Hettenbaugh v. Airline Pilots Ass'n, 5 Cir., 1951, 189 F. 2d 319, 320; Ketcher v. Sheet Metal Workers' Ass'n, E. D. Ark. W. D., 1953, 115 F. Supp. 802, 808.* Since most unions today have members in all or practically all of the states, unless the suit involves a small union or unless the local subdivision is regarded as a separate association from the international, no diversity is possible.

[20]*Garner v. Teamsters Union, 346 U. S. 485, 490-491.*

This Court has never decided whether the necessity, in a suit on a contract, to interpret or apply federal law in order to determine the existence or scope of the contract and whether it had been breached, presented a case arising under the laws of the United States for purposes of federal jurisdiction. The question was reserved in *Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667.*[21] The lower federal courts have held that the plaintiff establishes that his case arises under a law of the United States for purposes of jurisdiction under *28 U. S. C. 1331* when he shows that his suit is on a contract which depends for its meaning upon the construction of a federal law or regulation.[22] Under the traditional view that it is enough to establish jurisdiction that some aspect of federal law is essential to plaintiff's success,[23] the necessity of construing the Defense Production Act of 1950, as amended, and the Rules and Regulations thereunder, to determine the scope of the Employer's obligation to the Union under the contract here involved would establish federal jurisdiction under the federal question statute.

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[21]See the dissenting opinion of Mr. Chief Justice Vinson (at pp. 679-680), where he stated:

> "I have real doubts as to whether there is a federal question here at all, even though interpretation of the contract between private parties requires an interpretation of a federal statute and action of a federal regulatory body. But the Court finds it unnecessary to reach that question because it holds that the federal question, if any, is not a part of the plaintiff's claim and that jurisdiction does not, therefore, attach."

[22]*New Mexico College A. M. A. v. Albuquerque Broadcasting Co., 10 Cir., 1947, 158 F. 2d 900, 904, 906-908; Carmichael v. Anderson, D. Mo., 1926, 14 F. 2d 166, 167. Cf. Van Dyke v. Mid South Cotton Growers Ass'n, D. C. Tenn., 1934, 12 F. Supp. 138; Lichten v. Eastern Air Lines, S. D. N. Y., 1949, 87 F. Supp. 691; Moehle v. E. I. DuPont de Nemours & Co., D. C. Ill., 1947, 84 F. Supp. 427, 431.*

[23]*Smith v. Kansas City Title & Trust Co., 255 U. S. 180.*

Unless either the Labor Management Relations Act itself establishes the substantive federal law or such federal question jurisdiction can be based on the necessity of construing other federal laws in the course of determining breaches of contract, Section 301 becomes a meaningless gesture. For excepting the rare diversity case to which Section 301 was expressly inapplicable, no other source for federal jurisdiction exists. There is no situation in which it can even function as a procedural device.

3. If the Union is not correct in its argument that Section 301 sustains jurisdiction here because the National Labor Relations Act, as amended, creates the applicable federal substantive law, the Union should not suffer any loss of rights because its complaint rested solely in the Labor Management Relations Act for jurisdiction. As soon as the jurisdictional issue was raised the Union sought leave to amend to assert a right arising under the Defense Production Act, as amended, and the Rules and Regulations issued thereunder (R. 317). *28 U. S. C. 1653* provides:

> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

The predecessor statute, which insofar as the principle involved is concerned, is no different, was construed as permitting an amendment in the court of appeals after a petition for rehearing had for the first time attacked jurisdiction.[24] We respectfully submit that it was an abuse of discretion for the Court of Appeals to deny the Union leave so to amend.

CONCLUSION

The meaning and effect of Section 301 of the Labor Management Relations Act present important questions of federal law which should be decided by this Court as the issuance of the writ of certiorari in *Employees v. Westinghouse Corp., 348 U. S. 437*, establishes. The very limited scope of this Court's decision in the *Westinghouse* case, has increased the need for further consideration of Section 301 by this Court. The instant case presents an excellent vehicle for clarifying the many important issues upon which the members of this Court were unable to reach agreement in the *Westinghouse* case.

It is accordingly urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[24] *Van Sant v. Am. Express Co., 3 Cir., 1948, 169 Fed. 2d 355, 370-371. Cf. Illinois Terminal R. Co. v. Friedman, 8 Cir., 1953, 208 F. 2d 675, 677, reh. den., 210 F. 2d 229; Thronateeska Pecan Co. v. Matthews, 5 Cir., 1921, 277 Fed. 361, 365.*

APPENDIX A

The pertinent provisions of the Labor Management Relations Act (29 U. S. C. 185) are as follows:

TITLE III

Suits By and Against Labor Organizations

Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers and agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX B

The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. 158) are as follows:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

* * * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agree-

ment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract whichever occurs later:

APPENDIX C

The pertinent provisions of the Defense Production Act of 1950, as amended (64 Stat. 803, 65 Stat. 134, 50 U. S. C. A. App. 2101, *et seq.)* are as follows:

TITLE IV—PRICE AND WAGE STABILIZATION

§2101. Purposes of price and wage stabilization; cooperation by government agencies.

It is the intent of Congress to provide authority necessary to achieve the following purposes in order to promote the national defense: To prevent inflation and preserve the value of the national currency; to assume that defense appropriations are not dissipated by excessive costs and prices; to stabilize the cost of living for workers and other consumers and the costs of production for farmers and businessmen; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities; to protect consumers, wage earners, investors, and persons with relatively fixed or limited incomes from undue impairment of their living standards; to prevent economic disturbances, labor disputes, interferences with the effective mobilization of national resources, and impairment of national unity and morale; to assist in maintaining a reasonable balance between purchasing power and the supply of consumer goods and services; to protect the national economy against future loss of needed purchasing power by the present dissipation of individual savings; and to prevent a future collapse of values.

* * * * *

§2102. Price and wage controls—(a) Voluntary action.

In order to carry out the objectives of this title (sections 2101-2110 of this Appendix), the President may

encourage and promote voluntary action by business, agriculture, labor and consumers.

* * * * *

Price ceilings and stabilization of wages; when imposed.

(b) (1) To the extent that the objectives of this title (sections 2101-2110 of this Appendix) cannot be attained by action under subsection (a), the President may issue regulations and orders establishing a ceiling or ceilings on the price, rental, commission, margin, rate, fee, charge, or allowance paid or received on the sale or delivery, or the purchase or receipt, by or to any person, of any material or service, and at the same time shall issue regulations and orders stabilizing wages, salaries, and other compensation in accordance with the provisions of this subsection.

(2) Action under this subsection may be taken either with respect to individual materials and services and to individual types of employment, or with respect to materials, services, and types of employment generally.

* * * * *

(5) In stabilizing wages under paragraph (3) of this subsection, the President shall issue regulations prohibiting increases in wages, salaries, and other compensation which he deems would require an increase in the price ceiling or impose hardships or inequities on sellers operating under the price ceiling.

* * * * *

§2105. Violation of title and regulations thereunder.

(a) It shall be unlawful, regardless of any obligation heretofore or hereafter entered into, for any person to sell or deliver, or in the regular course of business or trade to buy or receive, any material or service, or otherwise to do or omit to do any act, in violation of this title (sections 2101-2110 of this Appendix) or of any regulation, order, or requirement issued there-

under, or to offer, solicit, attempt or agree to do any of the foregoing.

* * * * *

(b) No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title.

APPENDIX D

The pertinent provisions of the Rules and Regulations issued by the Wage Stabilization Board are as follows:

Sections 1 and 5 of General Wage Stabilization Regulation No. 1 dated January 26, 1951, promulgated by Economic Stabilization Agency and adopted subsequently on June 30, 1952, by Wage Stabilization Board provides as follows:

Section 1—No employer shall pay any employee and no employee shall receive "wages, salaries and other compensation" at a rate in excess of the rate at which such employee was compensated on January 25, 1951, without prior approval or authorization of the Wage Stabilization Board. New employees shall not be compensated at rates higher than those in effect on January 25, 1951, for the jobs for which they are hired.

Section 5—Petitions for the approval of any increase in "wages, salaries and other compensation" affected by this regulation shall be filed with the Wage Stabilization Board.

* * * * *

Section 4.4, Wage Stabilization Board Procedural Regulation, dated September 20, 1951, provides as follows:

Section 4.4(2)—Where there is a union, the petition or report shall be jointly filed by the employer

and the union. If the petition or report is signed by only the employer or the union, the Board agency with which the petition is filed shall notify the filing party that the petition is incomplete under the Board's rules and therefore cannot be processed, except:

(1) Where the filing party attaches to the petition copies of a written collective bargaining agreement signed by both parties, the Board agency with which the petition is filed shall (a) proceed to process the petition as if it were jointly filed, and (b) inform the other party that the petition is being processed as if it were jointly submitted, and give the other party 10 days within which to file any comments it may wish. If the other party denies that he was in fact a signatory to the contract, the case shall be submitted to a division of the National Board, or a similar group in the Board agency which has authority to approve or disapprove the particular petition for decision as to whether the processing should be continued. In all other cases, the processing will continue on its normal course.

* * * * *

Section 1, 2(a) and 2(b), General Wage Regulation No. 6, dated February 27, 1951, as amended December 6, 1951, provides as follows:

Section 1—If general increases in wage and salary levels in an appropriate employee unit have been less than ten (10) percent since the base pay period, future increases in wages, salaries, and other compensation may be permitted in amounts up to but not in excess of the difference between such past increases, if any, and the permissible ten (10) percent.

Section 2(a)—Base pay period. The base pay period shall be the first regular payroll period for each appropriate employee unit ending on or after January 15, 1950.

Section 2(d)—General increases in wages and salaries. For the purpose of calculating prior increases in wage and salary levels, general increases are defined as those increases in wage and salary rates which raised straight time earnings by one (1) percent or more in the appropriate employee unit. General increases do not include merit increases, promotions, reclassifications, length of service increases or other wage or salary adjustments of the types covered by General Regulation Five.

* * * * *

Section 4 of General Wage Regulation No. 8, dated March 1, 1951, as amended March 8, 1951, June 30, 1951, July 30, 1951, August 23, 1951, December 6, 1951, February 26, 1952, and April 23, 1952, provides as follows:

Section 4—Permissible increases in absence of cost-of living provisions. Any employer or any employer and union, who find that the real value of wages and salaries has declined since January 25, 1951 (based upon an acceptable index dated on or after January 15, 1951) may put into effect no more frequently than every six months, increases to restore such loss in the real value of wages and salaries from January 25, 1951, to the date of the increases.

(a) Increases under this Section may be put into effect without prior Board approval, unless a petition for approval of an increase in excess of the amount permissible under General Wage Regulation 6 is pending before the Board. If no such petition is pending, but the amount permissible under General Wage Regulation 6 has been exceeded by an increase put into effect after January 25, 1951, following Board approval, then:

(1) Where a Board decision letter contains specific instructions relating to subsequent adjustments under this Section, such adjustments may be made without

further Board approval only in accordance with such instructions;

(2) Where a Board decision letter contains no instructions relating to subsequent adjustments under this Section, such adjustments may be made without further Board approval only in accordance with either of the following alternatives:

(i) Increases may be based upon the rise in an acceptable index since the last available published index number as of the effective date of the last Board-approved increase; or

(ii) The amount by which the Board-approved increases exceeded the amount permissible under General Wage Regulation 6 shall be subtracted from the increase which would otherwise be permissible under this Section.

(3) The parties may file a petition for an appropriate index base date, no earlier than January 15, 1951, where they do not wish to use the self-administering alternatives in Paragraph (2) above.

(b) If further Board approval is not required.

(1) Increases put into effect under this section need not be offset against the amount of increases permissible under General Wage Regulation No. 6. Increases permitted under General Wage Regulation No. 6 may be put into effect without affecting the increases permissible under this section; and

(2) The employer shall keep a record of any wage or salary increase made pursuant to this section, including the amount of the increase and the unit of employees to which made applicable. This record shall be made available for inspection by appropriate government agencies while the Defense Production Act is in effect for a period of two years thereafter.

* * * * *

On November 9, 1951, the Wage Stabilization Board issued Resolution 68 (later amended in parts not herein material on December 6, 1951), which resolution read as follows:

> The Board will entertain petitions involving wage adjustments under General Wage Regulation 6 and 8 (Revised) in situations (a) in which a union or unions conduct negotiations with several employers or employer groups or regularly constituted employers' association(s) in an industry or area, and (b) in which uniform contracts negotiated as a result of such negotiations have traditionally contained uniform wage rates or wage rates which differ only by established categories of location or type of establishment, and (c) in which all employers participating in the negotiations agree to make uniform wage adjustments and other employers who sign uniform agreements with the union also agree to, or have committed themselves to, the same wage adjustments.
>
> 1. The amount of the allowable adjustment for all employers covered by the uniform contracts in the industry or area may be calculated on the straight-time average hourly earnings of the employer or employer group which has traditionally established such basic rates, provided however, that the petition certifies that the earnings data are representative of the appropriate employee unit in the establishments covered by the uniform agreements.
>
> 2. After such petition has been acted upon by the Board, the amount approved may also be granted by all other firms or establishments covered by the uniform agreements, provided they traditionally have made uniform wage adjustments in amounts equal to those agreed upon by the petitioners under 1, above, and provided that they comply with the record-keeping

requirements contained in General Wage Regulations 6 and 8.

[WSB Resolution 68 (Revised), as issued December 6, 1951 (17 F. R. 22); originally released November 9, 1951, WSB Release No. 137. The revision of December 6, 1951, eliminated a requirement, contained in the original Resolution, that the parties file reports of increases granted under GWR 6 and GWR 8 (Revised).]

* * * * *

Executive Order No. 10434, dated February 6, 1953, and signed by President Dwight D. Eisenhower, provides as follows:

Section 1—All regulations and orders issued pursuant to the Defense Production Act of 1950 as amended, stabilizing wages, salaries and other compensation, are hereby suspended.

Section 2—The wage, salary and other compensation adjustments proposed in petitions pending before wage and salary control agencies may now be placed in effect without the approval of such agencies. To the extent that agreements involved in such petitions are conditioned upon approval under Title IV of the Defense Production Act, this order shall be deemed such approval, but such approval shall be subject to paragraph 3 hereof.

Section 3—This order shall not operate to defeat any suit, action, prosecution, or administration enforcement proceeding, whether heretofore or hereafter commenced with respect to any right, liability, or offense possessed, incurred, or committed, prior to this date.

SEP 26 1955
HAROLD B. WILLEY, Cl

No. 386

In the

Supreme Court of the United States

October Term, 1955

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, AFL, LOCAL UNION NO. 294,
Petitioner,

v.

WESTERN FOUNDRY COMPANY,
Respondent.

OPINIONS OF COURT OF APPEALS FOR THE FIFTH CIRCUIT, APPENDICES E AND F OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX E

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15235

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, AFL, LOCAL UNION No. 294,
Appellant,

v.

WESTERN FOUNDRY COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(March 30, 1955)

Before HOLMES and RIVES, Circuit Judges, and WRIGHT, District Judge.

WRIGHT, District Judge: Appellant is the exclusive collective bargaining representative[1] of the production and maintenance employees of appellee, Western Foundry

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[1]Pursuant to the Labor Management Relations Act of 1947. *29 U. S. C., Sec. 141,* et seq.

Company, which is engaged in the manufacture and sale of soil pipe in Tyler, Texas. On November 17, 1951, the appellant and appellee entered into a collective bargaining agreement which, among other things, provided "Any increase or decrease on board prices or general wage increase or decrease received by the soil pipe industry generally will become effective under this agreement on the same date." During the term of the agreement, November 19, 1951, to November 18, 1952, there were two industry-wide wage increases for soil pipe workers, one effective January 2, 1952, of five cents per hour, and the other effective July 1, 1952, of four cents per hour. The appellee put into effect the four-cent increase but refused to pay the five-cent increase, and appellant brought this suit for breach of the bargaining agreement.

The court below held that, under the bargaining agreement, approval of the War Stabilization Board was a condition precedent to the payment of the wage increases[2] and since War Stabilization Board approval for the increases had not been obtained, appellee was not obliged to put the increases into effect. In its clear and comprehensive findings, the court did not refer to, nor comment on, the unilateral action of appellee in granting the four-cent increase without W. S. B. approval while refusing the five-cent raise because W. S. B. approval was not obtained.

Appellant contends that W. S. B. approval was not a condition precedent to the payment of the wages. Appellant contends that, while W. S. B. approval was required for the wage raise provided in Article 19 of the contract, such

[2]Title 4 of the Defense Production Act of 1950 prohibited wage increases during the term of the contract in suit without prior approval of the War Stabilization Board.

approval was not necessary for the industry-wide raises provided under Article 10, and it is for the raises therein provided that this action is brought. Appellant contends further that if W. S. B. approval was required by the contract, when the W. S. B. approved the industry-wide raises, it approved the raises in suit. Finally, appellant makes the contention that, in any event, it is relieved from its obligation under the contract, if any it has, to secure W. S. B. approval of the raises for the reason that appellee repudiated the industry wage increase provision of the agreement immediately the January 2 increase became effective, and that the appellee not only refused to join in a petition to the W. S. B. for approval of the increase, but actually obstructed appellant in its attempt to gain such approval.

Appellee, content with its victory in the lower court, although many important issues in the litigation were there decided against it,[3] insists that the condition precedent of W. S. B. approval was not obtained, that appellee, although admittedly refusing to cooperate with appellant in petitioning the W. S. B. for approval, is guilty of no obstructive tactics which in law would render unnecessary the occurrence of the condition precedent, and that, in any event, even if appellee has breached its contract, not only by the denial of liability thereunder for the wage increases in suit within six weeks of its signing, but also by frustrating the attempt of the appellant to gain W. S. B. approval for the raises provided therein, such raises can

[3]In the trial court appellee sought to show that the industry-wide wage increase provision of the contract, on which appellant here relies, was interlined into the agreement by its bargaining representative, without authority, over the signature of its president. This issue the trial court decided against appellee.

nevertheless not be paid, for to do so would violate Title 4 of the Defense Production Act of 1950.

A study of the record in this case leaves us in no doubt that if proper application had been made for approval of the industry-wide raises of January 2, 1952, and July 1, 1952, the W. S. B. would have given its approval of those raises for the employees of the Western Foundry Company, as it did for the balance of the industry. Appellant here is the certified bargaining representative for approximately 90% of the workers in the soil pipe industry of the United States. With respect to the industry-wide raises, the contracts entered into between appellant and the soil pipe manufacturers generally, including Western Foundry, for the benefit of all soil pipe workers, were similar. Only the workers of Western Foundry failed to receive the five-cent raise of January 2, 1952. That failure resulted from appellee's repudiation of the industry-wide wage increase provision in the bargaining agreement and its refusal to join appellant in a joint petition to the W. S. B. for wage increase approval.

It is clear under the law of Texas,[4] where this contract was entered into and was to be performed, as it is gener-

[4] *10 Texas Jurisprudence*, §260, reads as follows:

"Where the obligation of a party depends upon a certain condition being performed, and fulfillment of that condition is prevented by the other party, the condition is considered as fulfilled. If a contract is performable upon the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the happening of that event, and that he will hold himself in readiness to cooperate where cooperation is a necessary element in the happening of the contingency; and if, in violation of this implied covenant, he does something which prevents the happening of the event, the contract becomes absolute and must be performed as if the event had occurred. Also, if the happening of the contingency depends upon the action of the obligor, there is an

ally,[5] that a party cannot take advantage of the fact that a condition precedent has not been complied with where he himself has frustrated that compliance. Indeed, it is clear that where the circumstances are such that cooperation on his part is necessary to the occurrence of the condition precedent, then he is bound to give that cooperation under penalty of not being allowed to use the nonoccurrence of the condition precedent as a defense to a claim under the contract.

Appellee's conduct throughout the term of the agreement shows that it either misunderstood its obligations

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implied obligation on his part to exercise due diligence in the matter, and to do what is necessary on his part to bring it about."

See also: *Bueche v. Eickenroht, 220 S. W. 2d 911; Goodrum v. State, 158 S. W. 2d 81; Moore County Carbon Co. v. Whitten, 140 S. W. 2d 880; Hoffman v. Overton Refining Co., 110 S. W. 2d 93; Sanderson v. Sanderson, 109 S. W. 2d 744; 130 Tex. 264; Dockery v. Durham, 3 S. W. 2d 514; Miller v. Hodges, 260 S. W. 168, affirming 244 S. W. 634.*

[5] §295 of the Restatement of Contracts reads:

"If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused, * * *."

Williston on Contracts, §677, reads:

"It is a principle of fundamental justice that if a promisor is himself the cause of the failure of the performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.

* * * * *

"It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it. The early decisions are to the contrary, but it seems evident that the same principle of justice which precludes a promisor from taking advantage of a condition, the performance of which he himself has prevented, precludes him also from setting up a condition the performance of which he has made more difficult. 'Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing'; and, indeed, if the situation is such that the cooperation of one party is an essential prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary cooperation. * * *"

thereunder or was determined not to comply therewith. As soon as the first industry-wide raise was granted, it repudiated that part of the contract which would give its employees the benefit of that industry-wide raise. This in itself was a breach of the contract which rendered unnecessary compliance with the condition precedent.[6] *Clark v. Andrews, 5 Cir., 11 F. 2d 958.* But appellee did not stop with repudiation of the wage provision of the contract. It steadfastly refused to join appellant in a petition for W. S. B. approval of wage raises. And when appellant wrote the W. S. B. asking approval of the five-cent across-the-board raise for all Western Foundry employees, appellee's president immediately wrote the Board advising it that appellant's application for approval was an exparte one and was specifically not joined in by appellee. Under the circumstances and under the law, appellee's action rendered unnecessary the occurrence of the condition precedent and made the nonoccurrence thereof unavailable to it as a defense to the claims in behalf of its employees.

Appellee's final contention is that, assuming the performance of the condition precedent of W. S. B. approval is excused by the conduct of the appellee, Title 4 of the Defense Production Act of 1950 prohibited the payment of the raises without W. S. B. approval and now prevents recovery of those raises in this action. First of all, it comes in poor grace for the appellee to take such position in view of the fact that it unilaterally, and without W. S. B. ap-

[6]Corbin on Contracts, §977, reads:

"A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent. * * *"

proval, put into effect the four-cent industry-wide raise while refusing the five-cent raise for the reason that it did not have W. S. B. approval. Moreover, the cases cited[7] by appellee in support of its position are clearly distinguishable. Those cases construed contracts which were unenforceable because, as written, they were in conflict with valid statutes or regulations. The bargaining agreement here in no way violated Title 4 of the Defense Production Act of 1950. It specifically provided for W. S. B. approval of the raises as required by that Act. Appellee breached the contract by repudiating its wage provisions and by frustrating the attempt of the appellant to gain W. S. B. approval. While technically it might be said that, in view of the provisions of Title 4 of the Defense Production Act of 1950, this court cannot order payment of the wages in question, it may nevertheless grant damages to appellant against appellee for breach of contract. And the measure of those damages is the wages denied with interest from date of denial.

REVERSED AND REMANDED.

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[7]*De La Rama S. S. Co. v. Pierson, 9 Cir., 174 F. 2d 84; In Re Pringle Engineering & Mfg. Co., 7 Cir., 164 F. 2d 299; Wernhardt v. Koenig, 60 F. Supp. 709.*

APPENDIX F

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15235

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, AFL, LOCAL UNION NO. 294,
Appellant,

v.

WESTERN FOUNDRY COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(May 20, 1955)

ON PETITION FOR REHEARING

Before HOLMES and RIVES, Circuit Judges, and WRIGHT, District Judge.

PER CURIAM:

In view of the opinion of the Supreme Court in *Association of Westinghouse Salaried Employees v. Westinghouse Corporation, 348 U. S. 437, 75 Sup. Ct. 488,* decided March 28, 1955, the opinion of this court herein is withdrawn, and this case is remanded to the district court with instructions to dismiss the complaint for lack of jurisdiction.

OCT 11 1955
HAROLD B. WILLEY, C

No. 386

In the

Supreme Court of the United States

October Term, 1955

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, A. F. L., LOCAL UNION NO. 294,
Petitioner,

v.

WESTERN FOUNDRY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 386

In the

Supreme Court of the United States

October Term, 1955

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, A. F. L., LOCAL UNION No. 294,
Petitioner,

v.

WESTERN FOUNDRY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Western Foundry Company respectfully prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 17, 1955, be denied.

OPINIONS BELOW

The District Court did not render an opinion. Its Findings of Fact, Conclusions of Law and Judgment are found at R. 28-45, 70. The opinion of the Court of Appeals (R.

298) entered on March 30, 1955, is reported at 220 F. 2d 939. The per curiam opinion (R. 315) issued by the Court of Appeals on May 20, 1955, when it withdrew its prior opinion, is not reported.

JURISDICTIONS

The Judgment of the Court of Appeals was entered on May 20, 1955 (R. 316). A Petition for Rehearing duly filed by the Petitioner (R. 334) was denied on June 17, 1955 (R. 329, 334). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Does Section 301 of the Labor Management Relations Act authorize a labor union to sue an employer in the Federal District Court for the purpose of recovering wages allegedly owed by the employer to its employees represented by the union.

2. Is this suit within the jurisdiction of the Federal District Courts as a case arising under the laws of the United States.

(Question No. 3 in the Petition for Writ of Certiorari is encompassed by this question.)

3. Considering the circumstances of this case, was it an abuse of discretion for the Court of Appeals to deny the union Leave applied for under 28 U. S. C. 1653, to file an Amended Complaint to change and supplement its allegations of jurisdiction.

4. Can the union recover damages for breach of contract based upon the Company's failure to pay wages to its employees and measured by the amount of wages denied when recovery of the wages for a substantial part thereof is prohibited by Title IV of the National Defense Production Act of 1950 as amended (50 U. S. C. A. App. 2101, et seq.) and the administrative regulations promulgated thereunder.

STATUTES INVOLVED

The pertinent provisions of the Labor Management Relations Act (29 U. S. C. 141, et seq.) are set out in Appendix A, page 24 of the Petition for Certiorari. The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. 151, et seq.), are set out in Appendix B, page 25 of the Petition for Writ of Certiorari. The pertinent provisions of the Defense Production Act of 1950 as amended (50 U. S. C. A. App. 2101, et seq.) are set out in Appendix C, page 27 of the Petition for Writ of Certiorari. The pertinent provisions of the rules and regulations of the Wage Stabilization Board are set out in Appendix D, page 29 of the Petition for Writ of Certiorari.

STATEMENT

On March 20, 1953, Petitioner filed a Complaint on behalf of certain employees of Respondent in the United States District Court for the Eastern District of Texas, Tyler Division, alleging therein:

1. That the union was the collective bargaining representative for all production and maintenance employees of the defendant, Western Foundry Company.

2. That the action arose under the Labor Management Relations Act of 1947, 61 Stat. 136, U. S. C. Title 29 Supp. IV, Section 151, et seq. (commonly referred to as Section 301, Labor Management Relations Act).

3. That on November 17, 1951, the union and the Defendant Company entered into a Collective Bargaining Agreement covering matters pertaining to hours, wages and working conditions.

4. That Article X, Section 8, of said Collective Bargaining Contract provided as follows:

> "Any increase or decrease on percentage board prices or general wage increase or decrease received by the Soil Pipe Industry generally will become effective under this agreement on the same date."

5. That on January 2, 1952, the Soil Pipe Industry generally granted a five (5) cent per hour wage increase.

6. That defendant refused to grant such increase to its employees and thereby breached the Collective Bargaining Contract.

7. That the Plaintiff Union was entitled to judgment on behalf of the employees for the amounts due and owing said employees under the Contract.

On October 21, 1953, Respondent filed its First Amended Original Answer alleging among other things:

1. That the disputed contract provision, Article X, Section 8, had been interlined by the insertion of the words "general wage increase or decrease" after execution by the

Defendant Company by its attorney and Foundry Superintendent without authority, and that the defendant had never ratified such unauthorized act of its agents and that the defendant company had immediately repudiated the interlineation upon learning of the same.

2. That the Contract contained a condition precedent, Article XIX, Section 1, that had not been satisfied, to-wit: Approval of the wages sued for by the Wage Stabilization Board.

3. That the payment of the wages sued for, or a substantial part thereof, was prohibited by Title IV of the National Defense Production Act of 1950, and regulations promulgated thereunder.

4. That the plaintiff union was guilty of laches.

The case was tried without a jury and District Judge Joe W. Sheehy, held in his Findings of Fact and Conclusion of Law, among other things, that:

1. The defendant company was bound by the contract provision contained in Article X, Section 8, as alleged.

2. That the wages involved had not been approved by the Wage Stabilization Board and that such approval was required by law.

3. That the approval by the Wage Stabilization Board was a condition precedent to defendant's liability.

4. That the lack of Wage Stabilization Board approval was not due to any conduct on the part of the defendant company.

Whereupon the District Court granted judgment in favor of the Defendant Company on the merits.

Petitioner Union appealed to the Court of Appeals for the Fifth Circuit and that Court in its Original Opinion dated March 30, 1955, reported at 220 F. 2d 939, reversed and remanded in favor of the union holding that the Contract contained an implied covenant on the part of the defendant company to cooperate and secure approval of the disputed wage increase by the Wage Stabilization Board, that the defendant company, by its conduct, had frustrated and obstructed the attempt by the plaintiff union to secure Wage Stabilization Board approval and finally, that while technically Title IV of the Defense Production Act of 1950, would prevent the Court from ordering payment of the subject wages, it could nevertheless grant damages to the union for breach of contract and the measure of those damages was the wages denied.

Subsequent to the entry of the judgment of the Court of Appeals and after the Opinion of this Court was announced in the case of *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437*, on March 28, 1955, Respondent filed a Motion for Rehearing challenging the jurisdiction of the Federal Court as well as the decision of the Court of Appeals on the merits.

Petitioner filed an opposition to Respondent's Motion for Rehearing containing argument on the jurisdictional issue and the Court of Appeals after considering Respondent's

Motion for Rehearing and Petitioner's Opposition thereto, entered its per curiam opinion dated May 20, 1955, withdrawing its previous opinion and remanding the case to the District Court with instructions to dismiss the case for lack of jurisdiction (R. 315).

The Petitioner Union thereafter filed in the Court of Appeals a Motion for Leave to File a Supplemental Complaint, together with a tendered Supplemental Complaint, and a Motion for Rehearing in which it sought leave under 28 U. S. C. 1653, to add and supplement to its allegations of jurisdiction, an allegation that the case arose under the Defense Production Act of 1950, as amended, and the Rules and Regulations promulgated thereunder for the purpose of showing that the case was one within the jurisdiction of the Federal District Courts under 28 U. S. C. 1331. On June 17, 1955, the Court of Appeals denied all of the Petitioner's Motions. (R. 329, and Order following, R. 333.)

ARGUMENT IN OPPOSITION TO THE PETITION

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW FOR DETERMINATION

Petitioner admits that the recovery of wages is prohibited in this case by Title IV of the National Defense Production Act and argues that since wages are excluded from this case, the Opinion in the *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437*, is not applicable and did not require a dismissal for want of jurisdiction.

Indeed in contrast, petitioner insists that this case involves another cause of action consisting of the breach of a contractual obligation running only to the union growing out of the same Contract and predicated upon the alleged breach of an implied covenant on the part of Respondent Company to secure approval of the disputed wage increase by the Wage Stabilization Board. Petitioner does not elaborate on this species of cause of action nor does it explain what the measure of damages would be if this is not a suit for wages or for the benefit of the employees. Would the measure of damages unique to the union be for damages to its reputation, existence, loss of majority status, etc.? Certainly, if the suit is not one for wages, Petitioner has utterly failed to adduce any evidence to show the damages it has allegedly sustained. Notwithstanding this hiatus in Petitioner's argument, it argues further that Federal substantive law governs and that this law is created by the Labor Management Relations Act, a proposition which was rejected in unmistakable terms by this Court in the *Westinghouse* case.[1]

For the reason that the instant case, Petitioner says, involves another cause of action, not includable in the concept of wages, the Rule that a union cannot sue for wages due employees announced in the *Westinghouse* case does not apply but, however, since the Westinghouse Opinion in Petitioner's interpretation suggests great uncertainty and doubt as to whether any suits for enforcement of collective

[1] Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437, 441-449.

bargaining agreements may be brought in Federal Courts, an important Federal Question is presented and any doubts or uncertainties created by such Opinion should now be clarified and resolved.

The record is conclusive as to the cause of action involved in this case. The complaint of the petitioner (R. 1-7) which alleged jurisdiction solely under Section 301, Labor Management Relations Act,[1] on page 7 thereof, further expressly alleges that a sum of money is due the employees of the Respondent, and on the same page of the Complaint, demand is then made for judgment *on behalf of the employees* (italics added) for the disputed amount. The case was tried and appealed on this theory and it was not until after dismissal of the suit for lack of jurisdiction by the Court of Appeals on May 20, 1955, subsequent to Respondent's Motion for Rehearing, which Motion was resisted by Petitioner by means of an Opposition filed thereto, that Petitioner then filed a Motion for Leave to File a Supplemental Complaint alleging the failure of Respondent to pay certain wages to be a breach of a contractual obligation owed solely to the union. The Court of Appeals apparently concluded that the Motion for Leave to Amend was without merit, improper or both, and denied the Petitioner leave to amend and at the same time denied the Petitioner's Motion for Rehearing. (R. 329, 334.)

Assume, however, for the moment, that Petitioner's proposed Supplemental Complaint was or should have been

[1] 29 U. S. C. 185 (Sec. 301, Labor Managements Relations Act) appears in Appendix A to Petition for Certiorari, R. 24.

permitted and that another cause of action was presented for determination. Does jurisdiction under Section 301, Labor Management Relations Act, exist? Petitioner argues that collective contracts must be considered as bilateral, that enforcement of rights peculiar to unions is doubtful under State Law and that Section 301, Labor Management Relations Act, when considered in connection with Section 8(d), Labor Management Relations Act,[1] provides a body of Federal substantive law for the Federal Courts to enforce. This same argument was considered and rejected by this Court in the *Westinghouse* case in these words on page 443 of that Opinion:

> "Since a statute like the Taft-Hartley Act is an organism, Section 301 must be placed in the context of the legislation as a whole. So viewed, however, the meaning which the section by itself affords is not affected. While some sections of the Act in certain instances may be revelant in actions for breach of contract and as such binding also on the State, no provisions suggest general application of defined or theretofore available Federal substantive law in actions arising under Section 301."

and on page 449 of the same Opinion, the Court concluded that Section 301 was a procedural device enacted for the purpose of eliminating the pre-existing difficulties involved in suits for and against unions as unincorporated associations in these words:

> "Legislative History in its revelant aspects thus reenforces the meaning conveyed by the Statute itself as a mere procedural provision."

[1] 29 U. S. C. 158 [see 8(a) (b) & (d)] appears in Appendix B of the Petition for Certiorari on P. 25.

It is suggested by Respondent that the question of whether or not a body of Federal Substantive Law was created by Congress in the Labor Management Relations Act has been answered in the negative by this Court in keeping with the Rule of "constitutional adjudication,"[2] regardless of what cause of action is being asserted by a union. Further, this Court expressed its Opinion in the *Westinghouse* case that the applicable substantive law is State Law.[3] And expressed serious doubt as to "the constitutionality of a grant of jurisdiction to Federal Courts over a contract governed entirely by State substantive law."[4]

Therefore, insofar as Section 301, Labor Management Relations Act, is concerned, petitioner's jurisdictional problem would not be solved even if a different cause of action other than wages was involved, particularly if such cause of action is predicated on alleged Federal substantive law which does not exist. Petitioner has not offered any new or meritorious arguments that were not heard in the *Westinghouse* case. But the Court need not actually decide the question since this is a suit for wages as the pleadings

[2]Employees of Westinghouse, supra, p. 452-453, there this Court said: "We must, of course, defer to the strong presumption—even as to such technical matters as federal jurisdiction—that Congress legislated in accordance with the Constitution. Legislation must, if possible, be given a meaning that will enable it to survive. This rule of constitutional adjudication is normally invoked to narrow what would be otherwise the natural but constitutionally dubious scope of the language. E. g., *United States v. Delaware & Hudson Co., 213 U. S. 366, United States v. Rumely, 345 U. S. 41.*"

[3]Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S., Page 459.

[4]Employees v. Westinghouse, supra, 348 U. S., Page 449.

and record demonstrates and such case falls directly under the rule of prohibition announced in the *Westinghouse* case.[1]

Respondent submits that the Federal question, if any, raised by Petitioner has been fully decided and settled by this Court and in view of Rule 19 of the Rules of this Court, no other character of reason exists for considering the Petition for Certiorari insofar as the same relates the scope of jurisdiction under Section 301, Labor Management Relations Act.

II.

THE CASE AT BAR IS NOT ONE ARISING UNDER THE LAWS OF THE UNITED STATES

In view of the action of the Court of Appeals below in denying Petitioner's Leave to File a Supplemental Complaint on Appeal, setting up an alternative cause of action for damages for breach of contract founded upon the jurisdictional grant contained in 28 U. S. C. 1331, by alleging that Petitioner's alternative claim arises under the Defense Production Act of 1950, as amended, and Regulations promulgated thereunder, this case does not involved any other jurisdictional questions other than that supplied by Section 301, Labor Management Relations Act, since plaintiff's

[1]Employees v. Westinghouse, 348 U. S. 437, 461, where Mr. Justice Frankfurter in announcing the Opinion of the Court said:

> "Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one."

Complaint upon which the suit was tried and appealed rested solely on the supposed jurisdictional grant in that Section. (R. 1-7.)

In view of Petitioner's attack, however, on the action of the Court of Appeals in denying the Petitioner the right to amend on appeal, Respondent feels obligated at this point to assume for the purpose of argument that Petitioner's Supplemental Complaint (R. 317) had been filed and to consider the question of jurisdiction which would be raised by such Supplemental Complaint. Petitioner's claim in its proposed pleading is based upon an allegation that the Respondent refused to join in a petition for Wage Stabilization Board approval and affirmatively thwarted Petitioner's attempts to obtain Wage Stabilization Board approval of the increase.

Federal Courts are courts of limited jurisdiction, therefore, it follows that a party who invokes their jurisdiction for the first time must clearly show that his action is within their jurisdiction.[1] And the doctrine is well established that jurisdiction based on a federal question or because the suit is under a Federal Law must appear in the claim well pleaded.[2]

Petitioner does not allege a violation of the National Defense Production Act of 1950, or of any of the administrative regulations promulgated thereunder, that any particular right or immunity is granted Petitioner by any

[1]Rule 8(a) (1), Federal Rules of Civil Procedure, 2 Moore Federal Practice, 1625, Section 8.07, *KVOS Inc. v. Associated Press* (1936), 299 U. S. 269.

[2]*Louisville & Nashville R. Co. v. Mottley* (1908), 211 U. S. 149, 152.

provision of such rules or regulations, that a Federal right is an essential element of its cause of action, that a "real and genuine" dispute between the parties as to the meaning of the federal laws and regulations asserted is involved, nor does it allege how Petitioner's cause of action will stand on one construction and fall on another.

To determine when a case arises under the Constitution or laws of the United States, this Court speaking through Mr. Justice Cardozo laid down these rules as follows:

> "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the Plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.[1]"

Tested by the foregoing requirements Respondent submits that the allegations on the face of the proposed supplemental complaint failed to establish jurisdiction under 28 U. S. C. 1331.

But Petitioner argues that its contract depends for its meaning upon the construction of a federal law or regula-

[1]Gully v. First National Bank in Meridian (1936), 299 U. S. 109.

tion although it does not elaborate on the subject, and the Court is left to conjecture as to what manner of dependence is involved. Petitioner then suggests that jurisdiction under 28 U. S. C. 1331 would exist if merely some aspect of federal law is essential to Petitioner's success.

It has always been the rule that the Federal claim must not be merely colorable,[2] as it certainly appears to be from the face of the proposed complaint, and not every federal law emerging in a suit is proof that "federal question jurisdiction" exists.[3]

Any required construction of the National Defense Production Act of 1950 or the regulations thereunder in this case was due solely to the original defenses raised by Respondent in the trial court in its First Amended Original Answer (R. 11), and insisted upon by Respondent on appeal. Petitioner's proposed Supplemental Complaint must stand alone unaided by anything alleged by the Respondent in defense of the action.[4]

Petitioner has misconstrued the cases cited on page 21 of its Brief for they are certainly not applicable to the proposed Supplemental pleading Petitioner suggests. In *New Mexico College A. M. A. v. Albuquerque Broadcasting Company, 10 Cir. 1947, 158 Fed. 2d 900,* the plaintiff broadcasting company was suing for a declaratory judgment asking for a construction not only of the contract but of certain regulations of the Federal Communications Com-

[2]Smith v. Kansas City Title Co., 255 U. S. 180.
[3]Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667.
[4]Skelly Oil Co. v. Phillips Petroleum Co., supra.

mission as well, and the Court of Appeals held that the asserted right and duty was clear and plain, was predicated on a right and duty flowing from the Federal Communications Act and the regulations thereunder, and that the matter involved a genuine and present controversy between the parties as to the construction of the federal laws and regulations, and that the plaintiff's cause of action in that case would be sustained by one construction and defeated by another. The petitioner in this case is not seeking declaratory relief, although if it did, other opinions of this Court would still be controlling;[1] nor has it requested the court to construe any portion of the Defense Production Act of 1950 or the regulations thereunder, nor does it show in its proposed pleading why construction of such law and regulations would be essential to petitioner's right to recover nor indeed does it show that there is any controversy between the parties as to the construction to be placed thereon as revealed by the proposed Supplemental Complaint. The only question that has ever been involved is one of fact, to-wit: Whether or not the wages sued for by Petitioner were approved by the Wage Stabilization Board.

There appears to be a suggestion in Petitioner's Brief on page 20 that in view of the restrictive scope of jurisdiction afforded by Section 301 as determined in the *Westinghouse* case, this Court should then expand the scope of "federal question jurisdiction," abandon the historical limitations of

[1]Skelly Oil Company v. Phillips Petroleum Co., 339 U. S. 667, and Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437, declaratory relief in both of these cases was denied by the Court.

the doctrine and permit unions to sue under Section 301 merely because during the process of trial, the Court may be called upon to construe a federal law regardless of whether or not such construction is essential to Petitioner's claim and whether or not there is any real controversy as to the construction of the federal law. Such a step would be a highly questionable evasion of the Constitutional limitations contained in Article III, Section 2 of our Constitution and would not be in accord with the traditional interpretation of 28 U. S. C. 1331. Certainly this possibility was fully explored in the *Westinghouse* case.[1]

Respondent respectfully submits that in this case there is no pleading of "federal question jurisdiction" of record on the part of petitioner in accordance with Rule 8(a)(1), Federal Rules of Civil Procedure,[2] which would support jurisdiction under 28 U. S. C. 1331, and that even if the proposed supplemental complaint, the filing of which was denied by the Court of Appeals, had been allowed, it would not on the very face thereof have satisfied the requirement of a federal question well plead.

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[1]See the opinion by Mr. Justice Frankfurter on Pages 449-450 of Employees v. Westinghouse, supra, where it was said:

> "2. From this conclusion inevitably emerge questions regarding the constitutionality of a grant of jurisdiction to federal courts over a contract governed entirely by state substantive law, a jurisdiction not based on diversity of citizenship yet one in which a federal court would, as in diversity cases, administer the law of the State in which it sits. The scope of allowable federal judicial power that this grant must satisfy is constitutionally defined as 'cases in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made under this authority'." Art. III, Sec. 2.

[2]Rule 8(a)(1) reads as follows: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it * * *."

III.

THE DECISION OF THE COURT OF APPEALS WAS CORRECT

Regarding the jurisdictional issue, Respondent submits that the decision of the Court of Appeals, in dismissing the case for want of jurisdiction, was unquestionably correct for reasons already set forth.

There remains the question of the propriety and authority of the Court of Appeals to deny Petitioners the right to file a Supplemental Complaint, pursuant to the provisions of 28 U. S. C. 1653,[3] on appeal. Respondent first raised the jurisdictional question on its Motion for Rehearing filed after the Court of Appeals entered its judgment dated March 30, 1955 (R. 301-304,[4] and after this Court entered its opinion in the *Westinghouse* case on March 28, 1955. Petitioner then filed an Opposition to Respondent's Motion for Rehearing (R. 317) in which it argued the jurisdictional question, but in the face of Respondent's challenge of the Court's jurisdiction failed and avoided asking for leave to file a Supplemental Complaint. Subsequently, the Court of Appeals in its per curiam opinion dated May 20, 1955 (R. 315), withdrew its First Opinion and ordered the case dismissed for want of jurisdiction. Only after Petitioner had had an opportunity to gamble on the decision of the Court of Appeals did it decide to file a Motion for Leave to Amend setting up a new cause of

[3] 28 U. S. C. 1653 reads as follows: "Amendment of Pleadings to Show Jurisdiction. Defective allegations of jurisdiction may be amended upon terms in the trial or appellate courts. (June 25, 1948, C. 646, 1, 62 Stat. 944.)"

[4] 220 Fed. 2d 939.

action predicated on other jurisdictional grounds which Motion the Court of Appeals promptly denied. (R. 392 and 333.)

The few cases cited by Petitioner which have involved the construction of 28 U. S. C. 1653 have all involved the question of an amendment to show diversity where such diversity, in fact, existed.[1]

No cases involving a situation such as faced the Court of Appeals in this case have been discovered.

The wording of the statute appears to be written in such language that control of such amendments is left to the discretion of the Court.

There exists several reasons which would justify the Court of Appeals in exercising its discretion to deny the leave to amend. Petitioner tried and appealed his case on one jurisdictional theory and never made any effort to change its position until the Court of Appeals ruled adversely to its interest even though there was frequent and timely opportunity to amend and by having waited the Court of Appeals would be justified in treating Petitioner's action as a waiver of any right to amend. In addition, as appears in this argument elsewhere, Petitioner's proposed amended Complaint did not on the face thereof allege a "federal question case" within the jurisdictional grant of 28 U. S. C. 1331 or Article III, Section 2 of the Constitution and it would have been of no avail to Petitioner to permit the filing of such amendment.

[1]Van Sant v. Am. Express Co., 3 Cir. 1948, 169 Fed. 2d 355, Illinois Terminal R. Co. v. Friedman, 8 Cir. 1953, 208 F. 2d 675, reh, den., 210 F. 2d 229; Thronateeska Pecan Co. v. Matthews, 5 Cir. 1921, 277 Fed. 361.

It is important to note that the statute in question permits amendments of "defective allegations." By its proposed amendment the Petitioner was not curing a defect, but was, in fact, adding and supplementing its jurisdictional grounds with an entirely new cause of action predicated thereon when the issues encompassed by such alternative cause of action, based upon an obligation due solely to the union, was not considered or tried by the parties or the trial court.

IV.

A SUBSTANTIAL PORTION OF PETITIONER'S CLAIM IS OTHERWISE BARRED AS A MATTER OF LAW

Both the trial court (R. 41) and the Court of Appeals (R. 304) have heretofore held that payment of the wage increase sued for by Petitioner was never approved by the Wage Stabilization Board, and that consequently payment of such wages would be prohibited as a matter of law in view of the National Defense Production Act of 1950 (50 U. S. C. App. 210, et seq.), and the regulations promulgated thereunder. The Court of Appeals in its opinion of March 30, 1955, which was later withdrawn, concluded erroneously that despite the prohibitive restrictions of the National Defense Production Act, that the Court could nevertheless permit a recovery by allowing damages for breach of contract the measure of which would be equal to the amount of wages due and payment of which was prohibited.

Inasmuch as the lack of approval by the Wage Stabilization Board of the wage increases sued for by the Petitioner

is one of the vital defenses of the Respondent and in the light of the erroneous view already expressed by the Court of Appeals in its withdrawn opinion, it is respectfully submitted that in the event this Court should grant a Writ of Certiorari, then Respondent's question No. 4 should likewise be considered and disposed of along with the other questions raised by the Petition for the reason that this issue presents an important federal question not previously decided by this Court, the settlement of which would be proper and necessary to a full adjudication of the rights of the parties and for the further reason that the announced view of the Court of Appeals is in conflict with the decisions of other Courts on Appeal on the same matter.

General Wage Regulation No. 1,[1] promulgated by the Wage Stabilization Board, pursuant to authority granted by the National Defense Production Act, prohibited the giving of general wage increases by employers such as Respondent during the period covered by the subject contract without first securing approval of the Wage Stabilization Board. Application for such approval could be made by both union and employer jointly or by either one individually.[2] As an exception to the general scheme of wage regulation requiring prior Wage Stabilization Board approval, General Wage Regulation No. 6[3] permitted increases up to ten per cent since a certain base period begin-

[1]General Wage Regulation No. 1 appears in Appendix D., P. 29 to Petition for Certiorari.

[2]Section 4. 4(a) Wage Stabilization Board Procedural Regulation dated September 20, 1951, appears in Appendix D to Petition for Ceritiorari on P. 29.

[3]General Wage Regulation No. 6 appears in Appendix D to Petition for Certiorari, P. 30.

ning approximately January 15, 1950, and General Wage Regulation No. 8[4] permitted certain permissible increases in the absence of cost-of-living provisions without first obtaining Wage Stabilization Board approval (no cost-of-living provisions were contained in the contract between union and Respondent) by applying a formula set forth in such Regulation to certain relevant payroll data of an employer and comparing the same with the rise or decline in a cost-of-living index published by the Bureau of Labor Statistics and thereby determining the amount of the permissible increase. All possible increases under General Wage Regulation No. 6 had been exhausted and the only possible increase allowable without approval would be governed by General Wage Regulation No. 8. Evidence was heard and admitted as to the pertinent payroll data of the Respondent (R. 205),[5] and as to the Bureau of Labor Statistics Cost-of-Living Index applicable to the period covered by the contract. (R. 280, 281.)

After applying the formula described in 4(a)(i) of General Wage Regulation No. 8 (the applicable section in view of the pertinent evidence), to the payroll data of the Respondent and the Cost-of-Living Index published by the Bureau of Labor Statistics for the years, 1951-52, it ap-

[4]General Wage Regulation No. 8 appears in Appendix D, P. 31 of Petition for Certiorari.

[5]Pay raises of Western Foundry Company started in 1950:

"The wage data relating to appellee's employees shows that the hourly rated workers for whom additional wages are sought in this lawsuit were earning 85 cents per hour in 1950, were raised 10 cents per hour to a pay rate of 95 cents per hour on Oct. 23, 1950, were again raised 8 cents per hour to a pay rate of $1.03 per hour on Nov. 19, 1951, by virtue of Wage Stabilization Board Approval. (R. 205.)"

pears as a matter of mathematical calculation that a substantial portion of the wages sued for would be barred by the prohibitive effect of the pertinent regulations of the National Defense Production Act and that instead of a wage increase of five (5) cents per hour, as sued for, Petitioners, if otherwise entitled to recover, could only recover a .002 per cent of $1.03 per hour increase for the period, January 2, 1952, to August 5, 1952, and not more than 1½ per cent of $1.03 per hour increase for the period, August 15, 1952, to December 19, 1952,[1] the termination date of the Contract, since any amounts in excess of those allowable by the formula of General Wage Regulation No. 8 would require by law, approval by Wage Stabilization Board, which approval was never had or obtained.

The Court of Appeals while recognizing that lack of approval by Wage Stabilization Board as required by the appropriate statutes and regulations prohibited the recovery of wages in this case, nevertheless, held in its first Opinion on March 30, 1955 (later withdrawn), that it could grant a recovery to the Union of damages for breach of contract measured by the amount of wages that would have been due despite and in the face of the prohibition and impediment created by the National Defense Production Act of 1950.

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[1]The cost-of-living index showed a rise in cost of living from November 19, 1951, to January 2, 1952 (the date the alleged increased wages were due) of .5 points (from 188.6 to 189.1). Under Section 4 of General Wage Regulation No. 8 increases could not be made more often than each six months and the next rise of the index was on August 15, 1952, when index rose to 191.1. Thus there was a rise in the index between November 19, 1951, and August 15, 1952, of 2.5 points (188.6 to 191.1).

Percentage of increase is determined as follows:

(a) $.5 \div 188.6 = .002\%$
(b) $2.5 \div 188.6 = 1\frac{1}{2}\%$

This decision by the Court of Appeals is an incredible and unsupportable venture into legal semantics. To follow this line of reasoning would make not only this, but any similar Control Act passed by Congress easy of circumvention and as to the specific subject is in direct conflict with *De LaRama S.S. Company v. Pierson, 9 Cir., 174 Fed. 2d 84*, and *In Re Pringle Engineering and Manufacturing Company, 7 Cir., 164 Fed. 2d 299*, where both Courts held that in view of the Emergency Price Control Act of 1942 (50 U. S. C. 901), an Act much similar to the National Defense Production Act of 1950, that contracts to pay wages in excess of ceilings established by the War Labor Board pursuant to its stabilization authority, were void and unenforceable and that the Act prohibited payment of increases without approval. Other cases in the lower Federal Courts and in the State Courts support the same proposition.[1]

There is no difference in principle between enforcement of the Emergency Price Control Act of 1942 and the National Defense Production Act of 1950, insofar as the same prohibits increase of compensation without approval of the appropriate Stabilization Agency. Several cases in the State Courts in dealing with the National Defense Production Act of 1950 have arrived at such conclusion.[2]

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[1]Wernhardt, et al. v. Koenig, et al., 60 Fed. Supp. 709, Lovell v. Robert Jacobs Inc. (Supp. C. N. Y. Co.), 115 N. Y. L. J. 1534, Bennett v. Bollinger (Georgia Court of App.), 34 S. E. 2d 563, Traitell v. Livingston (N. Y. Sup. Ct., Appellate Div., 2nd Dept.) (59 N. Y. S. 2d 158).

[2]Mitchell v. Texas Housing Co., et al., 265 S. W. 2d 157, Lewton v. Fair-Tex Mills, Inc., 130 N. Y. L. J. 1436.

What the Union seeks here is compensation for employees. Since the employees would be the obvious beneficiaries of any recovery, whether such recovery be called damages or wages, payment by Respondent would still fall within the prohibition of the Control Act and recovery in excess of any sum permitted without Wage Stabilization Board approval would be barred as a matter of law.

Obviously if a Writ of Certiorari should be granted, a full adjudication of the relative rights of the parties cannot be achieved without a consideration of the prohibitive effect of the National Defense Production Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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